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IN THE

Supreme Court of the United States

October Term, 1966.

No. 628

LAWRENCE W. GOLDBERG,

Petitioner,

v.

EDWARD J. HENDRICK, Superintendent,
Philadelphia County Prisons,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
Citations to Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	6
Conclusion	12
Appendix A—Statutes	13
Appendix B—Opinion and Orders	20

TABLE OF CASES CITED.

	Page
Com. v. Goldberg, 415 Pa. 574 (1964)	5
Com. v. Nelson, 377 Pa. 58 (1954, 104 A. 2d 134)	6
Reynolds v. United States, 286 F. 2d 443 (9th Cir. 1960)	6, 12

STATUTES CITED.

	Page
Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. A. Section 1254(1)	2
Act of June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102, 28 U. S. C. A. Section 1651(a)	2
Atomic Energy Act of 1954:	
Section 2012 (42 U. S. C. A. § 2012)	7
Section 2021 (42 U. S. C. A. § 2021)	8
Section 2035 (42 U. S. C. A. § 2035)	9
Section 2051 (42 U. S. C. A. § 2051)	8
Section 2051(d) (42 U. S. C. A. § 2051(d))	9
Section 2233 (42 U. S. C. A. § 2233)	10
Section 2278a (42 U. S. C. A. § 2278a)	2, 3, 4, 6, 7, 10, 11
Pennsylvania Trespass Act, 1943, May 21, P. L. 306 § 1 (18 P. S. § 4954)	3, 4, 11
Report, AEC, January-December, 1961, pp. 510, 511	8
United States Constitution, Supremacy Clause, Art. VI cl. 2	2, 3

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EDWARD J. HENDRICK, SUPERINTENDENT,
PHILADELPHIA COUNTY PRISONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Lawrence W. Goldberg, prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit denying petitioner's application for a certificate of probable cause.

CITATIONS TO OPINIONS BELOW.

The Opinion and Order of District Court Judge Ralph Body is unreported and is printed in Appendix B, *infra* p. 20. The Order of the Court of Appeals for the Third Circuit is printed in Appendix B, p. 31, *infra*.

JURISDICTION.

The judgment of the United States District Court for the Eastern District of Pennsylvania was entered on May 31, 1966. Subsequently, an Application for a Writ of Probable Cause was presented to the said District Court and refused on June 13, 1966.

On June 17, 1966 Notice of Appeal was filed with the U. S. Court of Appeals for the Third Circuit and with the U. S. District Court for the Eastern District of Pennsylvania. On June 22, 1966 the Record was transmitted to

the U. S. Court of Appeals for the Third Circuit. On June 30, 1966 an Order was filed by the U. S. Court of Appeals that the Petition for a Certificate of Probable Cause was Denied. On June 30, 1966 the Record on Appeal was returned to the U. S. District Court. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1254(1); Act of June 25, 1948, c. 646, 62 Stat. 928; and 28 U. S. C. A. Section 1651(a), the All Writs Act.

QUESTION PRESENTED.

1. Where the A. E. C. granted a license to Philadelphia Electric Company to construct a 40,000 electrical kilowatt high temperature gas-cooled atomic reactor at Delta, Pennsylvania, in joint venture with A. E. C. and 52 other private utility companies, on land owned solely by Philadelphia Electric Company and posted by them under the Pennsylvania Trespass Act, without any notice posted by the A. E. C. under the Trespass sections of the Atomic Energy Act, and a taxpayer entered upon that land for the purpose of informing himself about the nature of the construction by viewing and taking photographs, where such taxpayer was then charged with Trespass under the Pennsylvania Act and convicted, and his conviction affirmed by the Supreme Court of Pennsylvania, and taxpayer petitioned in the United States District Court, Eastern District of Pennsylvania, for discharge on habeas corpus, alleging that the trespass provisions of the Atomic Energy Act superseded the Pennsylvania Trespass Act by making it a federal offense for anyone to trespass upon an installation subject to the jurisdiction or administration or regulation or custody of the A. E. C., where the District Court held that the federal trespass provision would apply but not to this land because in its opinion the land was not under the administration, or jurisdiction, or regulation, or custody of the A. E. C., despite the terminology in the Atomic Energy Act that a licensed utilization facility such as this was under its jurisdiction, administration, regulation, or custody, was it error for the District Court to deny peti-

tioner's application for a certificate of probable cause to appeal this decision, and was it error for the Court of Appeals for the 3rd Circuit to deny petitioner's subsequent application to it for a certificate of probable cause to appeal, where petitioner contended that land licensed for construction of such a nuclear power plant is no longer private property, subject to the mandate of the Pennsylvania Trespass Act, but a federally regulated and administered domain affected with the public interest under the terms of the Atomic Energy Act, so as to preempt the application of the Pennsylvania Trespass Act, under the Supremacy Clause of the Constitution of the United States, Art. 6, Cl. 2, where the question is unique and of great public interest, never raised before this Court before, and where the sole basis for the adverse decision of the District Court was its conclusion that this licensed nuclear facility was not under the jurisdiction, regulation or administration or custody of the A. E. C.?

STATUTES INVOLVED.

The statutory provisions involved are the Pennsylvania Trespass Act, 18 P. S. § 4954; The Atomic Energy Act of 1954, particularly 42 U. S. C. A. § 2278a; Supremacy Clause of the United States Constitution, U. S. C. A. Const. Art. VI, cl. 2. They are printed in appendix A, *infra,* pp. 9 and 10.

STATEMENT.

The Atomic Energy Commission granted a construction license in 1961 to the Philadelphia Electric Company, a Pennsylvania Corporation, for the construction of a nuclear demonstration reactor plant in Peach Bottom Township, York County, Pennsylvania. The site of the plant was in Delta, Pennsylvania. The Philadelphia Electric Company, as sole licensee, then executed separate and independent contracts with some fifty-two other utilities whereby these other utilities helped to finance the project in return for information about the development of atomic energy. This cooperative group of companies is known

as High Temperature Reactor Development Associates, Inc.

Construction began during the Spring of 1962 on the 40,000 electrical kilowatt high temperature gas-cooled reactor which was to serve in proving the practicability of a promising concept for such reactors. The agreement with the AEC established that the Peach Bottom plant would be owned and operated by Philadelphia Electric Company, in accordance with the terms of its contracts with the fifty-two other private utility companies. The AEC was to provide research and development assistance in establishing technology for the reactor in an amount almost equal to the costs of construction, and waived fuel use charges for the first five years of operation.

The alleged trespass occurred on December 19, 1962, on the Beach Bottom site at an area which was completely fenced in with guarded gates and prominently posted with printed notices that the land was private property and warning all persons from trespassing thereon under the penalties provided by the Pennsylvania Trespass Act, 1943, May 21, P. L. 306 § 1 (18 P. S. § 4951). The land on which the licensed nuclear facility was to be erected was owned by the Philadelphia Electric Company.

Petitioner, without permission, entered the main gate at the construction site where building operations were underway in connection with the proposed private nuclear power demonstration reactor plant. He stated that he entered the property for the purpose of looking at the construction of the power plant and taking pictures thereof. He refused to leave when requested to do so by an official of the Bechtel Corporation, a firm which apparently had contracts with Philadelphia Electric Company and the other group of companies. He remained inside the posted premises until arrested for violating Pennsylvania law by a Deputy Constable from York, Pennsylvania. There were no signs or regulations prohibiting trespassing posted by the AEC under the Atomic Energy Act, specifically 42 U. S. C. A. § 2278a.

On January 3, 1963, after a hearing before a Justice of the Peace, Petitioner was convicted under the Pennsylvania Statute and sentenced to pay a fine of $5.00 and costs. He appealed his conviction and sentence and following a hearing de novo on July 24, 1963, the Honorable James W. Buckingham, Judge of the Court of Quarter Sessions of York County, found him guilty and imposed a fine of $5.00 and the costs of prosecution. Petitioner then appealed to the Supreme Court of Pennsylvania, Middle District as of May Term, 1965, No. 14. The Supreme Court affirmed his conviction, stating in a Per Curiam opinion, dated July 1, 1964: "We find no merit in any of his contentions". *Com. v. Goldberg,* 415 Pa. 574, 575 (1964).

Following the decision by the Pennsylvania Supreme Court, the Clerk of Courts of York County mailed notices to Petitioner on May 14, 1965 and July 2, 1965, that his fine and costs were due to be paid. He failed to pay and a writ of attachment was issued by Judge Buckingham on July 23, 1965. On or about July 31, 1965, petitioner was arrested upon a contempt citation at his home in Philadelphia, Pennsylvania. He was placed in custody by the arresting authorities at the Philadelphia Detention Center, which is under the supervision and authority of the Respondent herein, Edward J. Hendrick, Superintendent of Philadelphia County Prisons. On August 2, 1965, Petitioner petitioned the District Court for the Eastern District of Pennsylvania on a writ of habeas corpus and secured his release on $500.00 bail with surety pending hearing and final disposition on the writ. A hearing was held before Judge Body of the United States District Court, Eastern District on August 11, 1965, at which time the factual allegations were presented and argument heard on the legal issues involved. Subsequent to that hearing, briefs were filed and arguments were heard on Petitioner's motion to dismiss the writ. After denial of the writ, the District Court and the Court of Appeals denied petitioner's application for a certificate of probable cause to appeal.

REASONS FOR GRANTING THE WRIT.

1. Petitioner's contention is that his conviction of trespass under the Pennsylvania Trespass Act should be held to be void because the Atomic Energy Act through its trespass provisions superseded the Pennsylvania Trespass Statute by making it a federal offense for anyone to trespass upon an installation subject to the jurisdiction, administration or custody of the Atomic Energy Commission.. It is his theory that where the use of land is regulated by a federal agency, where the licensee thereof is a private utility company, acting in concert with fifty-two other private utility companies to construct a demonstration nuclear reactor plant with federal research assistance funds, where the federal government is a co-venturer with the private utility, that the said private utility company in its capacity of the owner of the lands so licensed, administrated and regulated, may not post the land for trespass under the state statute, where the federal statute makes it a criminal offense to enter unlawfully upon land so licensed and regulated, 42 U. S. C. A. § 2278a. Examination of the Atomic Energy Act reveals the clear intent of congress that the federal act should supersede and preempt any state statute making it a crime to enter upon land so regulated and administered. Such land is affected with the public interest and is subject to regulation and administration which will not permit the owner of such land to assert his usual prerogatives with respect to its use. Such land is no longer private property in the same category as that subject to the mandate of the Pennsylvania Trespass Act, but a federally regulated and administered domain under the terms of the Atomic Energy Act. See *Com. v. Nelson,* 377 Pa. 58 (1954, 104 A. 2d 134); *Reynolds v. United States,* 286 F. 2d 443, 441 (9th Cir. 1960).

The District Court in the instant case held that Section 2278a applies to the type of trespass involved here. But it

went on to say that the property affected was not a facility, installation or real property subject to the administration, regulation or custody of the Commission.

It is clear from reading Section 2278a(a) that it is a trespass under the Atomic Energy Act for one to enter upon any facility, installation or real property subject to the jurisdiction, administration or in the custody of the Atomic Energy Commission. It would seem apparent that if the Atomic Energy Commission did not have such a licensed utilization facility under its administration, regulation and jurisdiction, then such facility would be unregulated and unadministered under the terms of the Atomic Energy Act. This question has never been raised in this Court.

A utilization facility of the type in question here is a joint project of the federal government and the private utility companies involved as licensees and co-venturers. See the Report of the Atomic Energy Commission for the period January-December, 1961, dated January, 1962. The intent of Congress is clearly specified in Section 2012 of the Atomic Energy Act (42 U. S. C. A. § 2012) wherein it is stated:

> "The Congress of the United States makes the following findings concerning the development, use and control of atomic energy . . . (e) source and special nuclear material production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public."

The nuclear facility which Petitioner allegedly trespassed upon at Delta, is a utilization facility and according to the Atomic Energy Act is regulated and administered by the Atomic Energy Commission in the national interest.

The intent of Congress that utilization facilities such as

Petitioner allegedly trespassed upon should be regulated by the Atomic Energy Commission is clearly defined in numerous sections of the Atomic Energy Act. Section 2021 (42 U. S. C. A. § 2021) in pertinent part provides as follows:

> "Commission regulation of certain activities:
>
> (c) No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—(1) the construction and operation of any production or utilization facility; . . ."

Section 2021 provides for agreements with the states concerning discontinuance of regulatory authority by the Commission but the clear mandate of the Congress as set forth in the Act is that the Commission shall retain authority and responsibility with respect to the regulation and administration of the construction and operation of any production or utilization facility. Thus, the Act makes clear that such authority, jurisdiction, administration, regulation and custody is specifically reserved to the Atomic Energy Commission.

The license granted to Philadelphia Electric Company in consort with its contractees for construction and operation of the utilization facility occupying the land involved herein was issued under Section 2051 (42 U. S. C. A. § 2051), providing for cooperative financing arrangements under the Commission's Power Demonstration Reactor Program. This meant 17.0 million dollars in assistance from AEC in participation with Philadelphia Electric Company and the other fifty-two private utility companies. *Report, AEC, January-December, 1961,* pp. 510, 511. The purpose of this economic partnership between government and private industry was to demonstrate the practical value of utilization of production facilities for industrial or commercial purposes under a Commission controlled program.

That the intent of Congress was to permit lawful entry by the public upon such demonstration utilization facilities is set forth in Section 2051(d) (42 U. S. C. A. § 2051(d)), which provides in part:

> "d .....
> No such arrangement shall contain any provisions or conditions which prevent the dissemination of scientific or technical information, except to the extent such dissemination is prohibited by law."

If the Philadelphia Electric Company as owner of the land were permitted to inhibit the public from entering upon this land to seek information concerning the scientific or technical progress of the demonstration utilization facility, it would prevent the dissemination of scientific or technical information, contrary to its license and the specific provisions of Section 2051(d). By permitting Petitioner's conviction of trespass, under the Pennsylvania statute and ignoring the joint nature of the venture and use of the land under the Atomic Energy Act, the State would interfere with the clear intent of the Congress to permit and to encourage the full dissemination of scientific and technical information pertaining to such utilization facilities as expressed in Sections 2051(d) and 2161 of the Act. It would render meaningless the provisions calling for the encouragement of such dissemination of information to the public.

The intent of Congress to provide for federal regulation of such facilities is specifically set forth by Section 2035 (42 U. S. C. A. § 2035). In Section 2035(c) an Inspection Division under the direction of a Director who shall be appointed by the Commission is set up. Section (c) provides in pertinent part as follows:

> ". . . The Inspection Division shall be responsible for gathering information to show whether or not the contractors, licensees, and officers and employees of

the Commission are complying with the provisions of this chapter (except those provisions for which the Federal Bureau of Investigation is responsible) and the appropriate rules and regulations of the Commission."

Petitioner's contention here, is that utilization facilities jointly constructed by licensees of the Atomic Energy Commission are regulated, supervised and under the jurisdiction and administration of the Atomic Energy Commission, which is their proper regulatory federal Commission. The point of conflict is the District Court's rejection of Petitioner's contention that this facility is so regulated, administered and in the custody of the Commission. The Act clearly places the responsibility of such regulation, administration and/or custody in the AEC, and removes it from the state in which the regulated facility is situated, absent an agreement to the contrary. No such agreement existed here. The cooperative financing arrangements involved are more than a federal subsidy. As has been stated, Section 2278a(a) clearly provides for regulation of trespass upon licensed utilization facilities by the Atomic Energy Commission.

Section 2233 (42 U. S. C. A. § 2233) clearly provides that every license issued by the Atomic Energy Commission shall be subject to the right of recapture or control under the Act, and further shall be subject to all valid rules and regulations of the Commission.

The Pennsylvania Trespass Statute was intended to protect the private owner of land in his peaceful use and enjoyment of said land. It was not intended to apply to property which by virtue of a federal statute and a granting of a license for construction under that statute had become affected with the public interest by the construction of a Commission proposed nuclear utilization facility and thus subject to the administrative and regulatory provisions of the Atomic Energy Commission which was specifically directed by Section 2278a to issue regulations in-

hibiting unlawful entry upon such a licensed utilization facility.

The Report filed in January, 1962, by the Atomic Energy Commission with the Congress specifically describes the utilization facility herein as a joint venture of the United States government and a private utility company. Thus, the license granted to construct such a nuclear utilization facility on the land clearly changed the nature of the interest of the owner of the land herein and removed it from the operation of the Pennsylvania Trespass Statute. The Pennsylvania Act required that the land be prominently posted with printed notices that the land was private property, and warning all persons from trespassing thereon. 18 P. S. § 4954. But where the land in question, as here, is under the administration and regulation of a federal agency and is occupied by a licensee and his subcontractors, the interest designed to be protected by the Pennsylvania Trespass Statute has been superseded and preempted by the federal trespass provisions. The Atomic Energy Act clearly required regulation of entry upon said land by regulation of the Atomic Energy Commission. It is immaterial whether such regulations were issued or not. By virtue of the license granted the Pennsylvania Statute was no longer applicable to the land.

The decision of the Court below is believed to be erroneous by virtue of its interpretation of the nature of the use of land involved herein so as to state that the privately owned lands and facilities at Peach Bottom did not fall within the category of Section 2278a which speaks of "a facility, installation or real property subject to the administration, regulates or in the custody of the Commission." This is real property subject to the administration and regulation of the Commission because of the financial and scientific interest which the Atomic Energy Commission maintained in the Peach Bottom project, and the provisions of the Act providing for administration and regulation of such a facility by the AEC. There is nothing in

the Act which requires that such property be either owned or leased by the United States. The only decision construing this section, *Reynolds v. United States, supra,* expresses the opinion that Section 2278 might well apply to property used by the Commission as well as the property owned or leased by the United States. 286 F. 2d at 441.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MALCOLM W. BERKOWITZ,
Counsel for Petitioner.

APPENDIX A.

Constitution of United States.

U. S. Constitution, Article 6, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Pennsylvania Trespass Act.

§ 4954. Trespass upon posted land.

Whoever wilfully enters upon any land, which the owner, lessee, or occupant has cause to be prominently posted with printed notices that the said land is private property, and warning all persons from trespassing thereon, under the penalties provided in this section, shall, upon conviction thereof in a summary proceeding, be sentenced to a fine not exceeding ten dollars ($10), together with the costs of prosecution, and in default of payment of said fine and costs, shall be committed to jail for one (1) day for each dollar of fine imposed.

1939, June 24, P. L. 872, § 954; 1943, May 21, P. L. 306 § 1.

Atomic Energy Act.

§ 2278a. Trespass upon Commission installations; issuance and posting of regulations; penalties for violation.

(a) The Commission is authorized to issue regulations relating to the entry upon or carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation, or real property subject to the jurisdiction,

administration, or in the custody of the Commission. Every such regulation of the Commission shall be posted conspicuously at the location involved.

(b) Whoever shall willfully violate any regulation of the Commission issued pursuant to subsection (a) of this section shall upon conviction thereof, be punishable by a fine of not more than $1,000.

(c) Whoever shall willfully violate any regulation of the Commission issued pursuant to subsection (a) of this section with respect to any installation or other property which is enclosed by a fence, wall, floor, roof, or other structural barrier shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not to exceed $5,000.00 or to imprisonment for not more than one year, or both.

Aug. 1, 1946, c. 724, § 229, as added Aug. 6, 1956, c. 1015, § 6, 70 Stat. 1070.

42 USCA § 2012. Congressional findings.

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub. L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, by-product, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, by-product, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub. L. 88-489, § 2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public, and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

Aug. 1, 1946, c. 724, § 2, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 921, and amended Sept. 2, 1957, Pub. L. 85-256, § 1, 71 Stat. 576; Aug. 26, 1954, Pub. L. 88-489, §§ 1, 2, 78 Stat. 602.

§ 2021. Cooperation with States—Purpose.

Commission regulation of certain activities.

(c) No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any

authority and the Commission shall retain authority and responsibility with respect to regulation of—

(1) the construction and operation of any productions or utilization *facility*;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be disposed of without a license from the Commission.

Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

§ 2051. Research assistance; fields covered; conditions.

(a) The Commission is directed to exercise its powers in such manner as to insure the continued conduct of research and development and training activities in the fields specified below, by private or public institutions or persons, and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge in such fields. To this end the Commission is authorized and directed to make arrangements (including contracts, agreements, and loans)

for the conduct of research and development activities relating to—

(1) nuclear processes;

(2) the theory and production of atomic energy, including processes, materials, and devices related to such production;

(3) utilization of special nuclear material and radioactive material for medical, biological, agricultural, health, or military purposes;

(4) utilization of special nuclear material, atomic energy, and radioactive material and processes entailed in the utilization or production of atomic energy or such material for all other purposes, including industrial uses, the generation of usable energy, and the demonstration of the practical value of utilization or production facilities for industrial or commercial purposes, and

(5) the protection of health and the promotion of safety during research and production activities.

(b) The Commission is further authorized to make grants and contributions to the cost of construction and operation of reactors and other facilities and other equipment to colleges, universities, hospital, and eleemosynary or charitable institutions for the conduct of educational and training activities relating to the fields in subsection (a) of this section.

(c) The Commission may (1) make arrangements pursuant to this section, without regard to the provisions of section 5 of Title 41, upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing by the Commission that advertising is not reasonably practicable; (2) make partial and advance payments under such arrangements; and (3) make available for use in connection therewith such of its equipment and facilities as it may deem desirable.

(d) The arrangements made pursuant to this section shall contain such provisions (1) to protect health, (2) to minimize danger to life or property, and (3) to require the reporting and to permit the inspection of work performed thereunder, as the Commission may determine. No such arrangement shall contain any provisions or conditions which prevent the dissemination of scientific or technical information, except to the extent such dissemination is prohibited by law.

Aug. 1, 1946, c. 724, § 31, as added Aug. 20, 1954, c. 1073, § 1, 68 Stat. 927, and amended Aug. 6, 1956, c. 1015, §§ 2, 3, 70 Stat. 1069.

§ 2035. Divisions, office, and positions.

There is established within the Commission—

Inspection Division, duties

(c) an Inspection Division under the direction of a Director who shall be appointed by the Commission. The Inspection Division shall be responsible for gathering information to show whether or not the contractors, licensees, and officers and employees of the Commission are complying with the provisions of this chapter (except those provisions for which the Federal Bureau of Investigation is responsible) and the appropriate rules and regulations of the Commission.

Aug. 1, 1946, c. 724, § 25, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 925, and amended Sept. 4, 1957, Pub. L. 85-287, § 3, 71 Stat. 612; Aug. 14, 1964, Pub. L. 88-426, Title III, § 306(f)(4)-(7), 78 Stat. 429, 430.

§ 2233. Terms of licenses.

Each license shall be in such form and contain such terms and conditions as the Commission may, by rule or regulation, prescribe to effectuate the provisions of this chapter, including the following provisions:

(d) Every license issued under this chapter shall be subject to the right of recapture or control reserved by section 2138 of this title, and to all of the other provisions of this chapter, now or hereafter in effect and to all valid rules and regulations of the Commission.

Aug. 1, 1946, c. 724 § 183, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 954, and amended Aug. 26, 1964, Pub. L. 88-489, § 18, 78 Stat. 607.

Jurisdictional Statutes.

28 USCA § 1651. Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."
June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

28 USCA § 1254.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .
June 25, 1948, c. 646, 62 Stat. 928.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

In the Matter of the Application of Lawrence W. Goldberg for a Writ of Habeas Corpus.

LAWRENCE W. GOLDBERG

v.

EDWARD J. HENDRICK, Superintendent, Philadelphia County Prisons.

MISCELLANEOUS

No. M-3056

OPINION AND ORDER.

MAY 27, 1966

BODY, *J.*

The matter presently before the Court, respondent's motion to dismiss the petition of Lawrence W. Goldberg for a writ of habeas corpus, arises from an unusual set of circumstances. The principal substantive issue to be decided is whether the Pennsylvania Trespass Act, 18 P. S. § 4954, has been pre-empted by a 1956 amendment to the Atomic Energy Act, 42 U. S. C. A. § 2278a, by virtue of the Supremacy Clause of the United States Constitution, U. S. C. A. Const. Art. VI, cl. 2.

Briefly stated, the relevant facts are as follows: In 1961 the Philadelphia Electric Company, a Pennsylvania corporation, was granted a license by the Atomic Energy Commission for the construction of an atomic power plant in Peach Bottom Township, York County, Pennsylvania. The Philadelphia Electric Company, as sole licensee, then

executed separate and independent contracts with some fifty-two other utilities whereby these other utilities helped to finance the project in return for information about the development of atomic energy. This cooperative group of companies is known as High Temperature Reactor Development Associates, Inc.

Construction began during the spring of 1962 on the 40,000 electrical kilowatt high gas-cooled reactor which will serve in proving the practicability of a promising concept for such reactors. The agreement with the AEC establishes that the Peach Bottom plant will be owned and operated by Philadelphia Electric Company. The AEC is to provide research and development assistance in establishing technology for the reactor and waived fuel use charges for the first five years of operation.

The alleged trespass occurred on December 19, 1962 on the Peach Bottom site at an area which was completely fenced in with guarded gates and prominently posted with printed notices that the land was private property and warning all persons from trespassing thereon under the penalties provided by the Act of 1943, May 21, P. L. 306, § 1 (18 P. S. § 4954). It is important to emphasize that this land was owned by the Philadelphia Electric Company.

Relator, without permission, entered the main gate at the construction site where building operations were underway in connection with the proposed atomic power plant. He stated that he entered the property for the purpose of looking at the construction of the power plant and taking pictures thereof. He refused to leave when requested to do so by an official of the Bechtel Corporation, a firm which apparently had contracts with Philadelphia Electric Company and the other group of companies. He remained inside the posted premises until arrested for violating Pennsylvania law by a Deputy Constable from York, Pennsylvania. There were no signs or regulations posted under the Atomic Energy Act, specifically 42 U. S. C. A. § 2278a.

On January 3, 1963, after a hearing before a magistrate, relator was convicted under the Pennsylvania statute and sentenced to pay a fine of five dollars ($5.00) and costs. He appealed his conviction and sentence and following a hearing de novo on July 24, 1963, The Honorable James E. Buckingham, Judge of the Court of Quarter Sessions of York County, found him guilty and likewise imposed a fine of five dollars ($5.00) and the costs of prosecution. Relator then appealed to the Supreme Court of Pennsylvania, Middle District, as of May Term 1964, No. 14. The Supreme Court affirmed his conviction, stating in a Per Curiam opinion dated July 1, 1964: "We find no merit in any of his contentions". *Commonwealth v. Goldberg,* 415 Pa. 574, 575 (1964).

Following the decision by the Pennsylvania Supreme Court, the Clerk of Courts of York County mailed notices to relator on May 14, 1965 and July 2, 1965 that his fine and costs were due to be paid. He failed to pay and a writ of attachment was issued by Judge Buckingham on July 23, 1965. On or about July 31, 1965 relator was arrested upon a contempt citation at his home in Philadelphia, Pennsylvania. He was placed in custody by the authorities at the Philadelphia Detention Center which is under the supervision and authority of the respondent herein, Edward J. Hendrick. On August 2, 1965, relator petitioned this Court for the instant writ of habeas corpus and secured his release on five hundred dollars ($500.00) bail with surety pursuant to my Order of August 2, 1965 pending hearing and final disposition thereon. A hearing was held in this Court on August 11, 1965 at which time the factual allegations were presented and argument heard on the legal issues involved. Subsequent to that hearing and after several continuances, briefs were filed and arguments were heard on respondent's motion to dismiss the writ.

Before reaching the merits of the case, it is necessary to discuss two jurisdictional questions.

I.

Exhaustion of State Remedies.

Relator did not apply for a writ of habeas corpus in the state courts following the affirmance of his conviction by the Pennsylvania Supreme Court. It is true that a federal district court will ordinarily refuse to entertain a petition under such circumstances because of the doctrine of comity. *United States ex rel. Drew v. Myers,* 327 F. 2d 174 (3rd Cir. 1964).

However, the requirement in a federal habeas corpus proceeding that all state remedies must first be exhausted is satisfied when the petition has received an adverse adjudication as to his federal rights in the highest court of the state. *Brown v. Allen,* 344 U. S. 443 (1953); *Irvin v. Dowd,* 359 U. S. 394 (1959). In the present case, I construe the language of the Pennsylvania Supreme Court to the effect that they found no merit to *any* of relator's contentions as an adverse adjudication of all his allegations, including any federal rights.

Furthermore, my late Brother, Allan K. Grim, recognized that in certain cases no useful purpose would be served by requiring a petitioner to burden the state courts with more petitions, even though he has not technically exhausted all available state remedies. *United States ex rel. Gary v. Hendrick,* 238 F. Supp. 757 (E. D. Pa. 1965). Judge Grim also cited *In re Thompson's Petition,* 301 F. 2d 659, 660 (3rd Cir. 1962) for the proposition that it is never an "indignity to state processes" to hold that the particular allegations of state abuses are clearly without merit". (238 F. Supp. at 759)

Since I am in full agreement with the foregoing views, I find that relator has sufficiently exhausted his state remedies.

II.

Whether Relator Was "In Custody" Within the Meaning of 28 U. S. C. A. § 2241.

Section 2241 of Title 28 provides, in pertinent part, that:

> "(c) The Writ of Habeas Corpus shall not extend to a prisoner unless—
>
> . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States."

In the present case relator was apprehended on or about July 31, 1965 and placed in immediate custody at the Philadelphia Detention Center. It is undisputed that he filed the instant petition for a writ of habeas corpus while still confined in the state institution. Therefore, relator was obviously "in custody" at the time he filed his petition. The fact that I released him on bail pending a hearing and final disposition of the matter should not retroactively defeat his satisfaction of the jurisdictional requirement that he be in custody for a writ to issue. *Reis v. United States Marshal,* 192 F. Supp. 79 (E. D. Pa. 1961); *State of Tennessee v. Morris,* 336 F. Supp. 780 (W. D. Tenn. 1965).

In *Reis v. United States Marshal,* supra, my Brother, Harold K. Wood, correctly distinguished the case of a defendant released on bail pending the trial on the merits from the case of a defendant released on bail pending the hearing and decision on the writ of habeas corpus itself (192 F. Supp. at 83). Judge Wood's distinction was approved in the *Morris* case, supra, when that court stated that "[Judge Wood] simply held that the custody requirement was met because petitioner was in custody when he filed his petition" (236 F. Supp. at 782-783).

I find, therefore, that relator's release on bail pending his hearing and later disposition of the petition did not

deprive this Court of jurisdiction to entertain the petition or to issue the writ, assuming he is entitled to a writ on the merits.

III.

The Merits of Relator's Petition.

Relator's principal contention as stated in his present petition is that his conviction under the Pennsylvania Trespass Act, 18 P. S. § 4954 [1] is unconstitutional in that the Pennsylvania Act was superceded by, or pre-empted by, Section 2278a of the Atomic Energy Act which provides in Sub-section (a) that:

> "The Commission is authorized to issue regulations relating to the entry upon or carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapons, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation, or real property subject to the jurisdiction, administration, or in the custody of the Commission. Every such regulation of the Commission shall be posted conspicuously at the location involved."
>
> Public Law 84-1006, § 6; 70 Stat. 1070; 42 U. S. C. A. 2278a.

Our first inquiry in this regard necessarily becomes, whether § 2278a was intended to apply either to the type

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1. "Whoever wilfully enters upon any land, which the owner, lesee, or occupant has cause to be prominently posted with printed notices that the said land is private property, and warning all persons from trespassing thereon, under the penalties provided in this section, shall, upon conviction thereof in a summary proceeding, be sentenced to a fine not exceeding ten dollars ($10), together with the costs of prosecution, and in default of payment of said fine and costs, shall be committed to jail for one (1) day for each dollar of fine imposed. 1939, June 24, P. L. 872, § 954; 1943, May 21, P. L. 306, § 1."

of trespass involved here or to property of the kind upon which relator "trespassed" and was ultimately arrested. A negative answer to that inquiry would immediately dispose of the issue in favor of respondent because the trespass provision of the Federal statute in question cannot possibly be said to pre-empt the State trespass act if the Federal provision was never designed to affect the same type of trespass or the same type of property over which the State exercises jurisdiction. Simply stated, unless there first exists an actual conflict between the State and Federal statutes, no question of pre-emption can arise.[2]

What, then, was Section 2278a designed to accomplish? It is sufficiently clear from the legislative history surrounding the 1956 Amendment that 42 U. S. C. A. § 2278a was intended to "furnish a sound legal basis for prosecuting trespassers on *Commission* property in the absence of any Federal trespass statute of general applicability." S. Rep. No. 2530, 84th Cong., 2d Sess. 5 (1956); U. S. Code Cong. & Adm. News, p. 4430. (Emphasis supplied)

Furthermore, it is clear that this new section was meant to deal with simple trespasses per se, as well as those involving dangers to health and security. It makes them all misdemeanors, except those falling within other Federal statutes protecting against espionage, sabotage and depredation of Government property. *Reynolds v.*

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2. In *Florida Avocado Growers v. Paul*, 373 U. S. 132 (1962), the Supreme Court enunciated the test to be applied in determining whether a Federal statute has pre-empted a State law. In that case the Court stated: "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." I conclude that no persuasive reasons for pre-emption exist in this case and also that Congress has not unmistakably so ordained. As will be shown infra, legislative history of § 2278a clearly indicates that this section was not meant to pre-empt the Pennsylvania trespass statute under the facts of this case.

United States,[3] 286 F. 2d 433, 441 (9th Cir. 1960). Section 2278a applies, therefore, to the type of trespass involved here—that is, simple trespass.

As to the class of property affected, Section 2278a speaks of "a facility, installation, or real property subject to the administration, or in the custody of the Commission." Do the privately-owned lands and facilities at Peach Bottom fall within this category? Counsel for relator vigorously argues that the land on which relator "trespassed" is, at the very least, "property subject to the administration" of the Commission because of the financial and scientific interest which AEC maintains in the Peach Bottom project. I disagree. These connections, which the Commission has with the privately run project in the form of a cooperative program for the promotion of peaceful uses of atomic energy, do not magically convert this privately owned real estate into something akin to a Federal enclave or reservation.

The Senate Report on the Bill discussed the kind of property to which the Amendment relates:

> "Such property can be both property in which the title is in the United States or property which is leased by the United States for use by the Commission. It does not extend to contractor-owned property."
> [U. S. Code Cong. & Adm. News, p. 4427]

The above language demonstrates to my satisfaction that Section 2278a does not apply to the land at Peach Bottom, Pennsylvania, which is owned entirely by Philadelphia Electric Company. The site in question is not property

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3. In that case the court held that the Commission was not authorized to issue a regulation under 42 U. S. C. A. § 2201(i) barring trespass upon the Eniwetok Proving Grounds in the Pacific Ocean which were being used by the Commission. Defendant's conviction was reversed since the regulation purportedly issued under that section was invalid. The Court also reviewed the history and application of Section 2278a with which we are concerned in the present case.

which is either owned or leased by the United States. The Senate Report limits the application of Section 2278a to those two types of property.[4]

It is also important to note that 42 U. S. C. A. § 2279 provides that nothing contained in §§ 2274-2278a shall affect the applicability of any other laws. That section, when read in conjunction with the regulations[5] issued pursuant to Section 2278a, further demonstrates that this State trespass statute was in no way pre-empted by the Federal Act.

In addition, the fact that none of the regulations referred to above were ever issued for, or posted at, the Peach Bottom site supports the conclusion that Section 2278a was never intended to confer upon the United States jurisdiction over this particular property.

In conclusion, it is the opinion of this Court that 42 U. S. C. A. § 2278a has not pre-empted the Pennsylvania Trespass Statute, 18 P. S. § 4954, under the facts and circumstances of this case. We find that relator was properly arrested and convicted under the laws of Pennsylvania.

Having decided the foregoing and having found no merit whatsoever to any of relator's remaining contentions, his petition will be denied.

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4. The court in *Reynolds v. United States*, 286 F. 2d 433 (9th Cir. 1960) thought that Section 2278a might apply to property "used" by the Commission, as well as property owned or leased by the United States, 286 F. 2d at 441, footnote 9. However, the court was of the view that Section 2278a applies only to the Commission's own activities such as nuclear testing and not to the activities of private licensees.

5. These regulations were adopted by the Commission on August 16, 1963 and are contained in 28 F. R. 8400, 10 C. F. R. 160. In particular, Section 160.8 provides: "Nothing in this part shall be construed to affect the applicability of the provisions of *State* or other Federal laws." (Emphasis supplied.)

ORDER.

AND NOW, this twenty-seventh day of May, 1966, IT IS ORDERED that the motion filed on behalf of respondent to dismiss the petition of Lawrence W. Goldberg for a writ of habeas corpus be and the same is GRANTED and relator's petition is hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED that such portion of my Order of August 2, 1965 which released relator on bail pending the hearing on, and final disposition of, his petition is hereby REVOKED.

/s/ RALPH C. BODY, *J.*

UNITED STATES DISTRICT COURT.
EASTERN DISTRICT OF PENNSYLVANIA.

In the matter of the application of
LAWRENCE W. GOLDBERG
for a Writ of Habeas Corpus

LAWRENCE W. GOLDBERG
v.
EDWARD J. HENDRICK, SUPERINTENDENT, Philadelphia County Prisons.
} Misc. No. M-3056.

CERTIFICATE OF PROBABLE CAUSE.

(Filed June 13, 1966.)

I, Ralph C. Body, the judge in the above-entitled cause in which the petition for a writ of habeas corpus was denied, do hereby certify that there exists probable cause for the appeal.

Witness my hand and seal as such judge this day of , 1966.

HONORABLE RALPH C. BODY,
United States District Judge.

13 June 66. (DENIED—RALPH C. BODY).

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

C. A. MISC. RECORD No. 409.
(Dist. Crt. Misc. No. 3056)

LAWRENCE W. GOLDBERG,
Petitioner,

v.

EDWARD J. HENDRICK,
SUPERINTENDENT,
PHILADELPHIA COUNTY PRISONS.

ORDER.

Present: KALODNER, HASTIE and GANEY, *Circuit Judges.*

Upon consideration of the petition for certificate of probable cause in the above-entitled case,

It is ORDERED that the petition be and it hereby is denied.

By THE COURT,

KALODNER,
Circuit Judge.

June 30, 1966.